

Municipal Law. (No 1)

The law of Nature is the unrevealed law of God as discovered by Reason.

1 Bl. 39

Law of Nations is in civil the law of nature applied to Sovereign States or Nations

1 Bl. 43

Vattel Pref

1. 6. 8

Municipal law is the Rule of civil conduct prescribed by the supreme power of the state.

1. "Rule. It is permanent uniform & universal" i.e. 1 Bl. 44. 5 as far as it extends. in other words general not personal within its own limits. "Permanent" not transitory but continuing either indefinitely or for a certain period

"Of civil conduct." Natural Law is a Rule of moral conduct. Municipal Law a Rule of civil conduct. i.e. Natural Law prescribes those duties which are incumbent on a state of Nature or unassociated as citizens of a Government. Municipal Law prescribes those duties, which are Required of us as members of a Nation.

Municipal Law

"Prescribed" Not Retro active (1 Bl. 45-6) Differences between Retroactive & ex post facto Laws the latter are always penal Laws the former either penal or Remedial

3 Dallas 386

391

Bull vs Calves
sup. 6. 16. 5.

Maxims of Law

1 Bl. 46. 90 By the supreme power in the Legislature

19 Vin 513 Interpretation of Laws. 1st Words to be as well
6 Ald 143 understood according to their most known usual
1 H. 58. 60 & popular signification

1 B. & C. 402

2 Roll 253 Terms of Art according to their acception
among the learned in the art.

1 Bl. 60.

2nd If words are dubious context to be consulted. Thus

1 W. 365.

their meaning may be established by their connection.

Balm 485.

Preamble often useful. So to compare the law with

3 P. Wms 185.

the laws relating to the same subject.

29 Ray 1028.

3rd Words always to be understood as having reference
to the subject matter.

1 Bl. 60

1 Bl. 61

4. Effects & consequences of diff. constructions to be
Regarded

12 Mod 344

1 Bl. 61.

5. Reason & spirit of the Law consulted *capante ratione*

Plow. 232.

4 Bar 647.

From the Reason & spirit of the Law Results the equity
of a law by which is meant a construction of it agreeable
to the Reason & spirit of it

1 Bl. 62.

3 Bl. 431

60 Litt 24. v

Unwritten Law is either written or not-written 1 Bl. 63
The unwritten law includes 1st the Common Law or 1 Bl. 63:7
general customs. 2^d particular customs or local
usages & 3^d particular Laws which are enforced
only in particular Courts.

This unwritten law is called unwritten because 1 Bl. 64:7.
its original establishment is not set down in writing,
but it derives its authority from immemorial usage.

Common Law. is a Customary law common
to all the Realm or state & not confined in its
operation to any particular district.

The Common Law depends for its support upon
its duration from time immemorial. an usage
to be immemorial must have existed from 1 Bl. 68
the accession of Rich.¹ I. but this distinction 2 Bl. 31
will be found of little use, for many parts of the
common law have been built up since the time
of Rich.¹ I. However the late decisions on new subjects
are considered as evidence of what the law was at the
accession of Rich.¹ I. i.e. in theory - tho' in point of fact
this theory is of small importance

The Evidence of this Common Law is to be found 1 Bl. 63:4:9.
in Records of Cts of Justice, Books of Reports, judicial
decisions & treatises of the learned, & to be expounded
by the judges of Cts. of justice. They are the Depositories
of the C.L. and are deemed ex officio to know it. Judges
do not in theory make the law - they merely declare
what the Law is.

Common Law

1 Bl. 70

These Records are not the Common Law itself, but merely evidence of the Common Law if a judicial decision was the Law itself it never could be overruled. There is a difference between Statute Law therefore & judicial decisions the latter can be overruled, the former not.

1 Bl. 67, 70

These judicial decisions form what are called precedents & precedents are only evidence not conclusive as to what the Law is but

1 Est. 295

precedents are to be followed unless it is flatly absurd or unjust.

It must be followed unless good Reason can be shown agt. it. The onus probandi lies on the party objecting to the precedent. A precedent is a former decision of the same point which afterwards comes in question.

How did the Common Law originate? the notion of immemorial usage is mere fiction. The Common Law was built up by Courts of justice. How then does it fall within the definition "a Rule to be prescribed by the supreme power". This Rule is sanctioned by the supreme power for it is tacitly acquiesced in by the Legislature.

Abolition of decisions in non-cases are legends only is evidence of what the Law uncommonly has been. As the Rules of the Law march into the Law of today, these were not known until long after Rich^d I. —

1872

The following is a summary of the results of the

work done in the field by the party during the

1872-73 season. The first part of the season was spent

in the field, and the second part in the laboratory.

1872-73 The first part of the season was spent in the field

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The appearance of the denudation is not always, as it should be, in accordance with the extent to which the denudation is supposed to have taken place. The denudation is supposed to have taken place in a series of steps, and the appearance of the denudation is supposed to be in accordance with the extent to which the denudation is supposed to have taken place. In some cases the denudation is supposed to have taken place in a series of steps, and the appearance of the denudation is supposed to be in accordance with the extent to which the denudation is supposed to have taken place.

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Notes on the denudation

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 11 Jan 2000 so far as the paper is concerned the house is still empty
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Municipal Law (1.2)

When does a statute take effect?

1. The statute takes effect at once unless it is otherwise provided.
 2. If the statute is a public law, it takes effect at once unless it is otherwise provided.
 3. If the statute is a private law, it takes effect at once unless it is otherwise provided.
 4. If the statute is a local law, it takes effect at once unless it is otherwise provided.
 5. If the statute is a special law, it takes effect at once unless it is otherwise provided.
 6. If the statute is a general law, it takes effect at once unless it is otherwise provided.
 7. If the statute is a law of a particular kind, it takes effect at once unless it is otherwise provided.
 8. If the statute is a law of a particular kind, it takes effect at once unless it is otherwise provided.
 9. If the statute is a law of a particular kind, it takes effect at once unless it is otherwise provided.
 10. If the statute is a law of a particular kind, it takes effect at once unless it is otherwise provided.

On the same subject

1. The statute takes effect at once unless it is otherwise provided. 6. But 1911.
 2. If the statute is a public law, it takes effect at once unless it is otherwise provided. 21. 31. 1911.
 3. If the statute is a private law, it takes effect at once unless it is otherwise provided. 1911. 1911.
 4. If the statute is a local law, it takes effect at once unless it is otherwise provided.
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Construction of Statutes

The purpose of construction is to ascertain the true meaning and effect of the law as it is written. It is a process of interpretation which is necessary in order to give effect to the law as it is written.

3. Co. 7. B.

1. Bl. 87.

In the construction of statutes, especially Remedial Statutes, these three things are chiefly to be Regarded The Old Law, the mischief & the Remedy provided by the new Law. and the construction sh^d be such as to suppress the mischief & advance the Remedy. The Judge consults the Old Law & the mischief that he may give the true construction to the Remedy. (See Rules given (page 273) for the interpretation of laws apply, to the construction of statutes. (Vide ante) and 1. Bl. 50. to 61.

1. Bl. 88.

3 Co. 708

8 Mo. 65

Such bl. 1

70. 295.

233. 310

387.

4. Bl. 193

1. Bank Bl.

Table Int. penal
stat

1. Bank 53. 61.

131. 138. 9. 116

Bac. Abr

St. i. 6. 9.

How 465

4. Bl. 193

3. Co. 7. 8.

There is an established distinction between the construction of penal & beneficial statutes. penal stat^s are to be construed strictly i.e according to the letter. This Rule is not correctly expressed the true Rule is this that penal stat^s are to be construed strictly as ag^t the party accused & liberally in his favor. Ex gra: No person can be adjudged to be within the purview or penalty of a penal st. unless he is within the letter of it tho he may clearly be in the spirit of it. & on the other hand no person shall be adjudged to be within the purview of a penal st. unless he is clearly within the Reason of it tho he may clearly be within the letter of it. So that a party to be punishable under a stat. must be both within the letter & Reason of it. The Only Reason is the benignity of the Law.

In Remedial stat^s the cardinal Rule is that the spirit of the Law must govern on both sides.

In genl any universality of expression in penal stat. does not include those unless they are named who by Reason of any incapacity (are exempted from the punishment of the stat. by common Law) thus idiots Lunatics &c. ie are exempted from such - that species of punishment whch. the statute prescribes. 1 Haw ch. 64. Sect 35. 8 Mo. 65.

Lord Brough says that the Rule of construction ought to be the same in all kinds of stat. and this is true but the distinction is well settled. - But a similar Rule of construction, was adopted in the construction in the construction of wills - 'All persons' was held to include only those who might convey land at C. L. 4 J. R. 3 3 Co. 7. 8

Where the Repetition of an offence incurs as is usual an augmented punishment the person who commits such offence cannot be punished with the augmented punishment unless he has before been convicted of the same offence & judgment rendered agt. him - 1 Hawk 168 1 Hale 354 570. 685. 4 Bac 651
This Rule Results from the established Rule of evidence for unless there has been a judgmt. agt. him the C. have no evidence that he has committed a prior offence of the same kind. but the Rule goes further where one is prosecuted for a second offence he must have had judgmt. agt. him before the second prosecution is commenced. - or he shall not suffer the augmented punishment. - and further he must have been convicted of the first before he committed the second or he shall not suffer the augmented punishment - The Ct. consider the augmented punishment as inflicted for the hardihood of the criminal in despising the first punishment. - 1 Root 52 163.

Construction of Statutes.

1 Root 52 There are many cases in which a penalty is repeatedly incurred by the continuance of an offence. Thus a penalty of \$10 for every month during which the offence is continued & our Ct. have held that in such case there can only one penalty be recovered at a time. but this Rule is contrary to the English law.

Peake R. 57
Cro. J.

Plowd. 86 The Rule of strict construction as agt. the subject has not been uniformly observed in Engl. Thus by st. 25 Edw. 3. a servant killing his master is guilty of petit treason & it has been held under this st. that if a servant killed his mistress that he was guilty under this st. of petit treason. But these cases are not returned to be now law.

Cro. J. 71
4 Bar. 651
Abr. St. c. 9

Keeble 79: 50 The penal laws of each sovereign state are in the strictest & most absolute sense local so that no Ct. can take notice of the penal laws of another state.

Patt. B. 1. C. 19.
5. 232.

3. J. R. 733

1. H. R. 123.

So if one commits murder in New York - he cannot be punished for this crime in Court for the murder is an injury agt. the people of New York & the people of this state are not injured & therefore cannot prosecute him.

But the penal laws of each sovereign state extend to aliens within

(16) that state and indeed to every one within the limits of that state.

1. Map. 116 In this state, if an inhabitant of another state steals a horse in New York & brings him into this state he may be punished here. also in Map. not in New York. 2. John R. 477. 9.

U.S. v Page
Circuit Ct. of
Court contra to
the Ct. Rule

There is no reported case in Court but there have been abundance of cases in the Sup. Ct. J. G. thinks the Rule in Court & Map is clearly wrong.

It is said that the bringing of the goods into this state is a Repre-
hension of the offence of stealing, & is a violation of our law
 against stealing.

Beneficial stat^s are construed equitably so that the letter may 3 Co 7
 may be either enlarged or Restrained for the purpose of effecting 1 Co 123
 the intention of the Legislature. Thus the St of wills enacts 11 Co 71
 that all persons &c may devise &c yet the Ct. held that under 3 Bl 430:1
 this stat. a feme covert c^d not devise. & Cts have greatly depar^t Pow. Dir 140:1
 ted in many instances from the letter as the St of Edw³ de Bac Abr.
 bonis asportatis was held to extend to Administrators tho' St i 6:7
 only Executors were mentioned so that prison. Dig 354 b

Under this Rule not only sentences & clauses but even words 3 Co 59 b & 60
 & technical words are construed to mean something diff^t. Bro C. 141. 207
 from what they do generally. Thus the word 'Void' is frequently 10 Co 59 a
 construed to mean 'Voidable'. Where any act or transaction is 2 J. R 60 b
 declared Void in any St. if the evil intended to be Remedied 7 J R 310
 w^d be let in by considering the transaction as merely Voidable 1 Bl 87
 the transaction must be Void but if the evil w^d not be let 2 N. R. 413.
 in or w^d be Remedied by considering the word Void as meaning
 Voidable. It will be construed Voidable.

When a St enables a Ct to do an act of Justice to a party the
 Ct. is in general bound to do the act in all cases falling within 2 Strout. 1131.
 the St. If it is apparent from the face of the St that it is to be 5 J R 538
 left to the discretion of the Ct. then this Rule does not apply. 2 Hawk 263
 Thus 4 & 5 of Wm⁴ & Mary. Respecting Costs by which defendants 374.5
 in informations are in certain cases entitled to Costs. Then 4 Bac 544.
 the Ct. is bound. If the matter instead of being an act of justice St i 1-
 were merely a matter of convenience the Ct w^d not be
 bound to do the act.

But this Rule has not been extended to Executive Officers. Penn. Cases. For their acts not being acts in the administration of Justice, do not come within the Rule above.

It is a general rule that a St. taking away a C. S. Remedy is to be construed strictly, because it abridges the Right of the subject. But this Rule does not extend to the St. of Limitations. The Reason of which exception appears to be that this St. is not made for the purpose of abridgment of the Subjects Remedy but for the purpose of quieting long possessions & for the purpose of discouraging state claims - & dormant.

Earth 396 Explanatory statutes are to be construed strictly. These are not
Salk 534 strictly penal nor Remedial - for otherwise there would be
4 Bac 650 no end of Explanations. The St. being intended to explain
it is presumed that the Legislature used precisely the words which
best convey their meaning. Where a St. is partly penal
1 Bl 88- & partly beneficial the diff't parts are to be construed diff'tly
3 Co 82- Thus 13 & 27 Eliz have been liberally construed as to the civil
Plow? 57- part but strictly as to the penal parts. The Stat of Usury is
Bar. Abr. S. C. 6. construed liberally so far as it acts on the contract & sets that
aside but strictly so far as it acts on the Offender.

1 Bl 89 It is a rule of construction that diff't parts of a St. are to be so con-
1 Co 47- strued if possible that the whole may stand & take effect. But if the
parts are inconsistent the latter Repeals the first. but if a saving
in a St. is altogether inconsistent with the St. so as to Render the
St. entirely negatory, the saving is void & the St. stands. as a St.
vesting in the King the Estate of A saving the Right of A.

1 Foub 22 The Rules for construing St. are the same in Law as
3 Bl. 431. 8. in Equity for the Object of both Cts. is to discover the meaning
& intention of the Legislature.

The common law & stat. law are in their own nature Repeal able by the Legislature. When the C. L. & a stat. are Repegnant the common L Rule is unparaly abrogated, for the last will of the Law-giver is Law.

Municipal Law.

And on the same principle if two st^s are Repegnant the former is Repealed. Co. Litt. 111-115. C. Mod. 287. 4 Bac. 638. 641. 1 Bl 89.

On the same principle if the former & latter parts of a stat. are Repegnant the latter must stand & the former is Repealed.

11 Co. 63

4 Bac 638-

A clause in a st. declaring that it never shall be Repealed is void. And a clause in a st. providing that it shall not be Repealed unless by a majority of two thirds &c. is void. The Constitution of U.S. is free from this objection. it is a compact between sovereign states.

1 Bl 90

4 Bac 638.

Our Constitution Requires that 2/3 of the Legislature sh^d concur before an amendment can be proposed to the people but a majority of the people may alter it. Q^u: Is it liable to this objection?

The law never favors a Repeal by implication. If two statutes appear Repegnant - the Ct. will endeavor so to Reconcile them as not to Repeal the former & unless there is a clear inconsistency the former will stand.

11 Co. 63

10 Mod 118

4 Bac 638. 9-

It is said that an affirmative st. does not abrogate the Common Law.

Co Litt. 111. 5

But if there is a st. in affirmative terms is inconsistent with Com. Law, the C. L. Rule must be Repealed. Thus at C. L. 6 days notice is Required now an affirmative st. that 12 days notice is unparaly Repeals the C. L.

4 Bac 641

1 Bl 89

Common Dig act. St. 2-

:2u: Does not the word affirmative mean in affirmance with the
C. L. ? if so the Rule is clearly correct.

2 Burr 803:5 If a st. gives a Kennedy in any case in which there was already a
Common Dig Kennedy by C. L. & the I does not expressly take away the bon: law
act on stat. C Kennedy nor is inconsistent with it the C. L. & stat Kennedy are
both good. The stat. Kennedy is here called accumulative. The party
suing may elect to proceed at C. L. or on the stat.

If a final st. inflicts a higher or lower punishment for a given
Leach 60-60 offense than so inflicted by an elder stat the former stat is Repea
252 led for it is deemed absurd that a Legislature could intend to
4 Burr 2026 prescribe two diff^t punishments for the same offense by statutes
4 Bac 654 of their own.
St. K.

And if a final stat inflicts a lower punishment than is pres
10 Mo. 337 cribed by C. L. here the St. Repeals the C. L. But if a final st. inflicts
4 Burr 2026 a higher penalty than that at C. L. for a given offense the st. does
2 Showers 30 not Repeal the C. L. but the Offender may be prosecuted at C. L.
4 Bl 654 and then the bon: law punishment is inflicted &c. Thus the stat.
Bac St-K 5th Ely. ag^t forgery. This last distinction is arbitrary and is
4 Bl 138. founded on the principle of linguistry.

1 Bl 89 It is said that an affirmative stat. can never Repeal a prior
ante 25 affirmative st. but this Rule is also unmaning or absurd.

2 Showers 30-

These Rules have been given for the Construction of Sts. which contain
no express clause of Repeal - they contemplate merely sts. which
contain an implied Repeal.

4 Bac 638 If a Repealing st. is Repealed the st. Repealed by the first Repea
1 Bl. 90 ling st. is Revived.
Bac St. D.

If a stat. is Repealed by several subseq^t st^s the first st is not Repealed until all these subseq^t st^s are Repealed -

If a St. whch has been Repealed is Repealed by a subseq^t st the intermediate Repealing act is itself Repealed. to the extent of the inconsistency - by implication. 4 Bac 638 -

All acts done under a st while in force but whch is afterwards Repealed invalid. but it is said that a st whch is afterwards declared null & void by a subseq^t act of the Legislature is no justification. but a subseq^t legislation cannot declare the acts of another Legislature void they may Repeal a prior act but it is the province of the Judiciary to declare a st void. If this were the case no man w^d be safe in obeying the st laws of his country. Such a construction might make the sub-seq^t stat. ex post facto. Jun 258 -

Retro-active Laws

Laws sh^d not be Retroactive hence it is that if a penal st after being violated is Repealed before the judg^t ag^t the offender & another penal st is made for the same offence he cannot be punished under either st unless the latter st continues the former st as to all offences committed before the making of the latter st. the consequence is that where Legislatures when they Repeal a penal st continue that prior st as to all offences committed under it. 1 Bl R 451 1 Hawk 169 4 Bac 636. 1 Root 59 W. S. 10 Grandwell

2^d: in case of qui tam pross after action commenced can the Repeal of the st destroy the vested Right of the Pl^{ff} vide post (58). -

The Rule is the same in case of the Expiration of a penal st before judg^t ag^t the offender. as when a st expires by its own limitation of an offence is committed before its expiration but if judg^t is not pronounced until after its expiration the offender can't be punished.

Municipal Law - But there are cases in which a st must consequently have a Retrospective effect. Thus a covenant to do an act which before the day of performance is declared unlawful this is not a Retrospective law
Salk 198 of performance is declared unlawful this is not a Retrospective law
1 Port. 644-6 tho in such an instance it has the effect of a Retrospective law on
1 Foub. 211 this covenant for it annuls the contract
2 Pl. 208
25 May 317
321. 1352.

Salk 198. On the other hand if our covenants not to do an act which a subject makes it his duty to do. the covenant is annulled & yet the st is not Retrospective for the annulling or suspension of the covenant is not the object of the law - and indeed there is a trust condition annexed to the contract - that it shall not be performed if it becomes illegal to perform it.

If a state declaring a contract to be illegal is afterwards repealed & such contract is made while the st. is in force the repealing of the st does not make the contract good. & indeed this is an universal Rule a contract at initio void can never be made good by any thing ex post facto. Ex: under the stamp act of the U.S. a note was given which was not stamped & after the repeal the stamp act an action was bro't & it was held that it did not lie.

*Litch.
County*

Ex post facto Laws

2 H Bl 581. 163. If complete performance of a contract is made illegal by a st. it
2 Port. 6. 31 may be enforced as far as it is consistent with the st. This is a general
1 Port. 6 428. 430 Rule in Equity & in some cases Relief may be had at Law. The
2 J R 254. principle is the same at Law as in Equity but the Remedy
1 Foub. 209. 211 at Law is not. Frequently adapted to the case.
Pl. 284.

Ex post facto laws

The Constitution of the U.S. forbids the several states to pass ex post facto laws. U.S. Art. 1. § 10
 Laws by which is meant a Retro active penal law. It also forbids the several states to pass any law impairing the Obligation of a contract. 4 Wheat. 122
 It has been settled (that the insolvency laws of the states which discharge the debtors future property are unconstitutional) but as far as they discharge the person of the debtor they are constitutional. For this does not discharge or even affect the debt it merely affects the extent of the Remedy.

(It was held 7 C. 100 that the Remedy is not affected)

It is laid down that a Statute purporting that which is absolutely impossible is void. Such a Statute has perhaps never been made but according to the theory of the C. L. if there were any such they were invalid.

It has been said that a Statute contrary to Reason & divine Law is void. 8 Co. 118
 but this is an indefensible Opinion. for there is no power that can authoritatively pronounce that any Statute of the Legislature is void contrary to Reason & divine Law. Now where collateral & unforeseen unreasonableness in a law occurs a C. of E. may say it is void on the ground that it was not the intention of the Legislature to carry the law into effect under these circumstances. But this Rule supposes that the intention of the Legislature is clear & clearly contrary to Reason or the divine Law. the two cases therefore stand on different grounds. Every legislative act contrary to the written Constitution of a state is void. for constitutional law is paramount to Statute law & it is settled that it is the province of the Cts. to determine the constitutionality of a statute.

If a Statute makes a new Rule concerning an old offence & appoints certain particular jurisdictions to execute the Law the Court of B. R. is not ousted of its jurisdiction for the ancient jurisdiction of Cts. of gen. & jurisdiction is not to be ousted by implication. 1 Hawk. 8. 9. 114
 9 Co. 118
 2 Salk 564
 2 Burr 1042
 1 Mod 452

1 Hawk 9
2 Hale 5
Bro. J 603.
Cous 524
2 Hawk 202 (n)
22 192

But if a st. creates a new offence & appoints a certain jurisdiction for the trial of it the jurisdiction of Cts of genl jurisdiction is excluded. Thus a st. enacts that every private nuisance shall be a felony or misdemeanor & enacts that Com. Pleas shall have Cognizance. the jurisdiction of B. R. is excluded.
For that it had no prior jurisdiction, Nothing is here taken away by implication - for nothing at all is taken away in any manner.

Cous 26

If a statute confers a special authority on certain persons affecting the property of individuals the power must be strictly pursued & it must appear on the face of their proceedings that their authority was strictly pursued or their proceedings are void & they become trespassers - for these sts are in derogation of the Rights of third persons and are therefore to be strictly construed & pursued.

Authorities conferred by statute.

If a st enables a certain body of men to do certain things by vote of a majority & appoints a certain number to be a quorum. the vote of a majority of the quorum is not suff^t unless it is a majority of the whole. (This Rule supposes the body not to be a corporation). For such bodies are the creatures of the st law & have no powers except such as are expressly given or necessarily incidental & the powers necessarily incident are only such as are necessary to their existence & the performance of the powers expressly given. Now the power of binding the whole by a majority of the Quorum is not expressly given nor in the case above stated is it necessarily incidental.

If a ^{private} special authority is given by st to two the authority is joint (unless it is expressly said that it shall be joint & several) & one can't execute the authority alone neither does it survive to the survivor if one dies.

But if a public authority is conferred by st upon two or more it is joint & several and on the death of one the authority survives.

By private authority is meant a power affecting merely in individuals.

If the authority given by st to several is of a public nature the act of a majority all being present is the act of all.

If the authority even of a private nature all must probably concur.

In the case of Corporations the Rule is that if all the Corporation are summoned the vote of the majority of those present will bind the whole.

Actual summons does not appear to be necessary where the meeting is Regularly & legally convened.

Pleading Statutes

The rules on this subject in the books are exceedingly confused chiefly from looseness of language. One cause of it has been the confounding of the terms "pleading" "counting upon" & "Reciting" a Stat.

- 3 L^d Ray^d 11
221. Merely to plead a St is to state those facts which bring a case within it. it is not to name a St or Recite it. Ex: to plead the St of limitations the Def^t merely says more than six years ago. Again to plead the St of frauds & perjury the Def^t merely says no note or memorandum in writing. again to plead the St of usury the Def^t merely says that the Pl^t agreed to take & the Def^t to give 7 per cent interest &c. &c.

Counting upon a St consists in expressing the St. or Referring to it in words. Thus "ag^t the form of the St in such case made & provided" &c or by other words adapted to the case - as by virtue of the St. in such case made & provided.

Reciting a Stat is quoting its contents.

- 4 Co. 76. Of Public Stat^s the Judges are bound to take judicial notice. therefore it is not necessary to Recite a public Stat. the Rule is generally supposed that he need not plead a public Stat. but any one intending to take advantage of a public St. must plead it tho' he need not Recite it. The facts which bring the case within the Stat. must be alleged.

- Bro E 236
1 Bl 86. On the other hand J^{ts} of Justice cannot take judicial notice of private Stat^s. a party then meaning to take advantage of a private Stat. must Recite it either verbatim or substantially & if its existence is denied it must be proved.
- 10 Co 57.
2 Mo 57.
2 Roll 466.
1 Bac 38. Its Existence is denied by the plea nil in Rec^o

In this state a man may defend under a private st with Municipal Law
 specially pleading & Reciting it as at Com. Law but here as well 4 Co. 76
 as in England if an action is bro't on a st. the P^f must both plead 10 Co. 57
 & Recite it. The power in Court of giving a private stat. in evidence 2 East 341
 under the genl. issue arises from our stat. of pleading but the private Bac Abr
 statute must be Read in evidence like a Deed. St. L. 2

-Public Statutes Required to be pleaded need not be Recalled in
 genl. counters, on tho' st must be pleaded - & this whether it is the ground (Pb)
 of claim or of defence. The Reason is that the Judges are bound Cro E 236
 ex officio to take notice of public stats. Bac. Abr. s. 1. 1 Hawk c 25.
 5100. 4 Co. 76.
 10 Co 57.
 2 East 341 -

But a miscal of a public st may be fatal even after
Verdict. Cowp 474.

It is said that if a public st is misrecited in an immate Cro. E. 136
 rial part it is cured by a verdict 376. 522.

659. Cro E. 236. 45

But this does not appear to be the Rule -

Bac St. L. 5

The misrecital of a public st. does not appear to be fatal unless
 the pleader ties himself up to the st. as Recited as by the words &
contra secundum formam statute prodicti.

Lord Ray? 392

2 Wm. N. 576

Doug 90. 2

Pro? 79. 84

But if he misrecites a public st & concludes by counting upon it
 genlly as contra formam statute - the judges will take judicial
 notice of the true stat & the misrecital however material will not
 be fatal

Cro E. 382

And in case the party does thus tie himself up to a stat
 it is ill after Verdict

Cro E. 236

245.

Cro. E. 232

Pleading statutes

Municipal

Law-

2 Mc N 517

L. Ray? 382

157d 386

2 Md 241

The misrecital of a private st is not fatal on demurrer or after verdict for the Ct do not judicially know what a private is until produced in evidence. If then a private st is misrecited the usual way of taking advantage of it is by the plea nil til Record

5 Co 59 b

119 a

3 Salh 391

Hob 72

It is laid down that a public st when to be used as a defence need not be specially pleaded but there are comprehensive exceptions. 1st When it is to be pleaded in defence ag^t a specialty the st must be specially pleaded i.e. the facts which render the specialty void must be specially pleaded for the defence furnished by the st is not consistent with the plea "non est factum". L^d Coke says because the law deems so highly of a specialty that it cannot be defeated except by a special plea, which seems to be no Reason at all.

15 Saund 283 (n)

L^d Ray? 153Esp^r Dig 107

Black Bills 195

and indeed whenever the defence furnished by a st is inconsistent with the gen^l issue in the action the st must be specially pleaded.

Since st of limit must be specially pleaded to all actions except in the case of debt or simple contract.

In this state a st when to be used by way of defence may universally be given in evidence under the gen^l issue. And this by virtue of our st. of pleading. but notice must in gen^l be given to the adverse party.

4 Co 76

2 Roll 456. 66.

2 Md 57-

In declaring on private st it is necessary not only to plead the st but also to recite it & the recital may be either literally or substantially. The latter is the more proper mode - for the Ct cannot take judicial notice of private st.

10 Co 57

Hob 227-

If a st is in part public & in part private the former part must be pleaded and the private part must be recited.

But it is never necessary in any case to Recite the title of a st. on the
preamble for the title is no part of the law. neither is the preamble
 any part of the law itself it merely explains the Reasons why the st.
 is made. but tho' not necessary yet the misrecital of the title on
 preamble of a public st. may be fatal but there are contrariety
 of Opinions (same distinction as in case of public st. generally
 vide ante) i.e. the misrecital is fatal when the party ties himself
up to the st. as Recited (ante)

3 Co 33

4 Bac 655. 8

H L 3 H 5

L^d Ray? 77

Hard 324

6, Mod 62

4 Bac 658

65 st.

Where by Rules of pleading the Recital of a st. is necessary the Recital
 of the st. must contain the date of the stat. & the place where
it was enacted & these are essential for a private st. is deemed as
 much a private document as a deed or bill of exchange. and a
 mistake of this kind is fatal on gen^l demurrer. The document
 is not suff^{ly} described. It is not identified.

2 Hawk 246

Bro J 211

Bro Bar 232

Bowp 474

Comyn Dig

act on st. 5.

To the Dec^r on a private st. the Def^t may plead nil til Record
 so the plf where the Def^t pleads a private st. for the existence of a
 private st. is matter of fact. (see public stat.) & the party pleading
 it must prove its existence.

4 Co 76

2 Mod 257

8 Co 28

Bro. E 355

4 Bac 655

If then the plf declares on a public st. & Recites it incorrectly the Def^t
 sh^d demur not plead nil til Record for whether a st. pleaded
 exists or not is not matter of fact but matter of Law.

8 Co 28

Cro E 355.

Municipal Law. Counting upon Statutes

Barth 382 It is a gen^l Rule that a public st. need not be counted upon
 Cro. E. 601 as st. of lim. - st. of usury &c

1 Bac 38

Action st (Bar. Actⁿ qui tam B.)

4 Bac 18 Exceptions to this Rule are first if there are concurrent Remedies

Bornyn Dig 3 by C. L. & by st the party suing under the st sh^d count upon it
 Action st 2 for otherwise the Ct will presume that the party pursues the C. L.

Holt R 634 Remedy. (Rule in Bornyn incorrectly expressed) Conyn says the

Luke 407 st^d must be rehearsed but there can be no provision that it

2 Coke Inst. 200 is necessary to Revive it - Vide Brief Barrow & North C. C.

3 Count. Dec. 1826.

2 East 341

2 Hawk B2.C 25 II In actions supra st. of any kind the Plf must conclude by counting

5.110.6 p332.7 on the st this Rule holds whether the prosecution is civil or criminal

Kuling 32 Thus if one sues to Recover the penalty of the st of usury - he must

2 East 333 conclude contra formam &c

341: 2 (n) For this statⁿ there is no satisfactory Reason but it is a well

6 East 126 settled Rule. Bar abv. actⁿ qui tam &c.

1 Venk 103

7 R 521

Sal. 505 III. If a public st gives a new species of action is a sort of

4 Bac 656 action unknown to the C. L. he who sues under the st must

Holt 634 count upon the st. (Rule incorrectly expressed in some of the books)

2 East 339 For this Rule also there is no very good Reason).

341. 334 Ex An action to Recover the place wasted under the st of
Gloucest^r. The st of W2^d does not give a new action with
 in the meaning of this Rule - this stat merely enables certain
 officers to frame an action in certain cases.

When a public st. merely extends an old action to a new case it is not necessary to count upon the st. Thus the st. of Edw. Comyn Dig III enabling an Ex^r to maintain trespass ag^t him who has acted on st. 8. 2 Bac 439 injured the property of Testator during the Testator's life time. 405 Tit Exc.

In actions there on public st. not penal counting upon the st. is unnecessary except where it gives a new action or unless there is a concurrent Remedy at Com. Law.

If then a st. creates a Right or duty & gives new damages for its violation there is no need of counting on the st.

Again where a st. not penal creates a Right without expressly giving any Remedy the st. need not be counted upon - because in both these Cases the C. L. supplies the Remedy & there is no other Remedy.

Barth 382

Salk 212

If one st. merely prohibits an act as illegal & another st. prescribes the penalty both must be counted upon by him who prosecutes for the penalty. tho' both are public, for the Right of Recovery is given by neither of the st. alone.

4 Bac 656

Plowd 206

Bac st. 24.

So if one st. inflicts a certain penalty, and a subseq^t st. enacts that this penalty shall go to the informer the informer must count upon both st. & the offender is liable even after Verdict.

2 East 333 -

An offence may be laid in one & the same indictment as ag^t Com. L. and as ag^t a st. but this must be done by two counts. The count framed as ag^t C. L. will conclude ag^t "the peace & of evil example" - The other ag^t the form of the st.

Leach 235

or 35.

When one continued trespass is in part a wrong at C. L. and part is wrong by st. there need be but one count & that sh^d conclude contra formam &c. & this will Refer merely to the st. offence.

2 Stratt. 1066 If a temporary public St. has expired & is continued by a subse-
 4 Bac 638 quent one & counting upon the St. is necessary, counting upon the former
 656 63 Stat. St. is sufficient for the former it only contains the law. The latter
 A. St. D. only continues the duration, it does not contain the law.
 When according to the preceding Rules counting upon a St. is necessary
 2 East 333. the Omission is always fatal even after Verdict.

5 JR 162 If an indictment or other prosec.^{to} concludes with contra formam
 2 Hawk c stat. when the offence exists only at C.B. the words contra &c
 25.5 115.6 may be rejected as surplusage. but in fact this question has
 8 JR 362.3 always occurred after Verdict. On demurrer J.G. thinks that
 Comyn R 26 the indictment w^d be ill. & a gen^t demurres w^d Reach it
 Comyn Dig. not being within the St.^d of geo. fails. w^hch Require a special
 action St C. demurres in case of objections to mere matter of form in all
 cases except indictments.

1 Burr 153 When there is an exception in the material clause of a Stat this
 5 JR 83 exception must be negatived in a complaint &c on a St. but an
 1 JR 141 exception in a distinct clause or in another St need not be
 Comyn Dig negatived. In the former case the exception necessarily enters
 into the description of the offence or the Right of action. but in
 1 Burr 148 the latter case the exception is matter of defence for the Def.^t like
 6 JR 559 the defence on a bond. When necessary if the exception is not
 7 JR 27 negatived the Omission is fatal. Stora 497.
 8 JR. 542
 1 East 646
 2 McHal 544

Ex gra by Engl game laws it is provided that if any persons not
 possessing such a freehold interest shall kill such game he shall
 forfeit &c. in an indictment on this St. it must be alleged
 that the Def.^t not possessing such an estate killed &c. but seems
 if the St had been this no person shall kill such game & in a
 distinct clause a proviso that persons having such a freehold
 interest shall not be within the St.

Municipal LawReading Statutes

(33)

When there are two subsisting Remedies or sanctions one by
 st the other by C.L. the party complaining may found his
 complaint on either

2 Hawk 202/n
 2 Burr 799. 803
 805.
 Coups 648.
 Salt 45.

And in such a case if the Plf takes the st Remedy but finds that
 he cannot make out his case under the st. he may still in the
 same suit claim at C.L. & Recover at C.L. if he can make out
 his case at C.L. Ex. on st Relating to certain trespasses in the
 Right season. A persons common law suit is unavailing on the st.
 but he cannot make out that the trespass was committed in
 the night, yet under this ^{delegation} suit the Plf may Recover as at C.L.
 & the Court will Reject the contra formam stat. as surplusage.
 (the same Rule in case of public prosecutions). Formerly held
 that the Rule did not hold as to Crim^l prosecutions

2 Bl R 400
 2 Hawk 211
 302. 356.
 Salt 212
 2 McHal 493. 5
 5 JR 169
 2 Kel 138.
 1 Hawk 211
 2 Hale 171
 560 99
 Bro.E. 231
 307. 697.

A strong case of this kind occurred in Litchfield County
 on the Stat. of Blasphemy.

Where there are concurrent Remedies at C.L. & by st the C.L.
 mode of proceeding & C.L. Remedy may be pursued tho' the st.
 points out a mode of proceeding different from that at C.L. for
 this particular mode of proceeding is considered as the mode
 to be pursued when the st Remedy is taken.

2 Burr 803. 5
 834
 4 J.R. 202
 2 Hawk 302.

But if that which was no offence at C.L. is made illegal by st. & the
 st. points out the mode of prosecution - this mode & this only it is
 said can be pursued -

bro E J 644
 760 36, a
 4 Burr 2323.

How no Com. L Remedy is to be ousted

2 Burr 803. 5
 834
 6 Mod 86

this Rule obtains 1st where the particular mode of pros is pros-
 cribed in the prohibitory or enacting clause

God u 123-
 2 Hawk 202
 4 J.R. 205.

- 1 Bun 540. 5 And II Where there is no prohibiting clause in the st. Is any person
 2 Bun 803 who does &c shall be punished &c to be sued for by information.
 805. For in these cases the Offence & the ^{Kennedy} Sanction are so blended that
 Bar. Mr. St. 9 &c. they cannot be separated they are created together.

But where the particular mode of prosecuting is prescribed
 in a distinct substantive clause the st. mode of proceeding
 4 JR 205 may be pursued or any proper C.L. mode of prosecution
 2 Hawk 302 may be adopted for an independent clause creates an
 offence which when made was punishable by any proper
 C.L. mode. & the sub st clause cannot oust by implication
 the Kennedy which the C.L. had before provided.

- 6 Mod 26 If a st creates an offence & prescribes no mode of proceeding
 1 Bun 44 & no ^{pen-} sanction, the C.L. will lend its aid to punish the offence.
 3 Lev 290 and it will in such case punish it as a misdeemeanor.
 Doug 428 Thus it shall not be lawful for any man to do so &c.
 10 Co 75 If any one violates such a law the C.L. calls it a misde-
 4 Bac 653 meanor & punishes it as such.
 St. R.

1 Bun 544.

(16) The Rule is the same where the st creates a Right but prescribes
no Remedy. The Common Law will lend its aid to enforce
 the Right in any action adapted ~~to~~ the case

To obstruct the execution of powers granted by st is an offence
 Doug 425 at C.L. & may be prosecuted by any proper C.L. Remedy as
 or 245. by indictment in which case the indictment sh. not
 conclude contra formam stat. for it is not a stat.
 offence but a C.L. offence

Qui tam pro

A public offence as such cannot be prosecuted by any individual in his own name. for the offence is ag^t the public & the Remedy for every wrong belongs to the party injured. In Eng^l then in such case the prosecution sh^d be in the name of the King. But individuals do prosecute in Eng^l but it is in the name of the King and in such case the informer frequently prosecutes when no penalty is to be Recorred to the informer & this is the practice in Eng^l. even in Cases of felony & in case of indictment. this is the practice but there is no Rule sanctioning the practice.

2 Hawk 265f
4 Bl 2.5.7
2 JR 27
190. 198
205. for example
Lunch for 3
perform }

This practice has never obtained in this state when no penalty is to be Recorred to the informer. There is however a mixed species of prosecution partly public & partly private which prevails here & in Eng^l. viz a qui tam prosecution, here the prosecutor always claims some damages to which the law entitles him (the prosecutor) -

A qui tam is then a prosecution brought partly for the prosecutor & partly for the King. Here the individual prosecuting is the sole party tho the pro^{ss} is partly in behalf of the King - the very form shews this. "Qui tam pro Domino Rege & quam pro se ipso in hac parte sequitur."

2 Hawk 264
4 Bl 308.
3 Bl 162.
1 Bac 37.
Comyn Dig.
Act on St & l

Pro^{ss} qui tam are either by action or by informatⁿ. The diffⁿ is that the former is carried on by civil pro^{ss} by writ deⁿ &c, the latter is carried on by a criminal pro^{ss}. viz a ca^{ss} under which the Def^t. is to be imprisoned or put to bail.

4 Bl 308
13 Ed 161. 2.

(36) Qui tam pros^{ns}

Comp. 382 Qui tam pros^{ns} commenced by forthwith process is
4 JR 656 8 properly an information - a qui tam information -
1 Wils 125 The other may be called a qui tam action. This is a civil
3 JR 448 suit (ante 10).
7 Do 257
Kirby 179.

2 Bl 308 Qui tam pros^{ns} whether civil or criminal in gen^l are brought on
1 Bac 37 { final st^s to Recover a penalty or forfeiture of some kind -
Act on st^s } A qui tam prosecution is now used at C. L. to Recover
2 Hawk 377 a penalty or forfeiture given by the C. L. It is used merely
Bro E 877. to obtain a penalty given by st^s - where the statute makes
Bro C 360 1 an individual to sue & Retain part of the penalty.
532:3.

3 Bl 160 A popular action is one given by Stat to any one who will sue
2 Bl 437 for the penalty incurred by the violation of a penal st^s. In some
Comyn Dig cases the whole penalty is given to the informer & in others part
Action st^s c 1 to him & part to the King &c but in both cases the action
3 Bl 161 2 is called popular.
2 Hawk fol. Ed 265

Popular actions & qui tam are sometimes confounded but they are
Comyn Dig by no means the same. A popular is not always qui tam as where
Action st^s c 1 the penalty is wholly given to the prosecutor here the action is not
3 Bl 161 qui tam & a qui tam may not be popular as where part of
2 Hawk 377 the penalty is given to the individual injured by the offence &
1 Bac 37 the Rest to the King here the pros^{ns} tho' qui tam is not
popular for it can be brought only the individual injured

If an individual is civilly injured by an offence prohibited by
Comyn Dig st^s he may have his civil Remedy by a civil action on the st^s
Action st^s a. 1. there is no Recovery to him as expressly given for it is implicitly given
10 Co 75 b by the st^s. This is neither qui tam nor popular.
4 Bac 653.
st. R.

When a St. prohibits or Commands a thing for the protection of private Rights an individual may have an action on the St. for Common Dig an injury done to him by its violation tho' the St. is penal & the St. Act on St. p. expressly gives him no Remedy, but in this & the last case the 6 Mod 26:7 action is not qui tam it is an action in the Common form for the 4 Bac 653 civil injury. Ex private nuisance &c. St. 16.

When a St. inflicts a penalty ag^t any one for disposing of another of 3 Lev 290 his Right or interest in such case if the penalty is not appropriated 60 Litt 159 it belongs to the party injured by the violation of St. so that the party Common Dig injured may have his civil action such as the L.S. supplies for the Act on St. p. enforcing of the Right or Remedy created by the statute. - The principle Bac Abr is that such must have been the intention of the Legislature. St. 16.

In what cases will qui tam prosecutions lie?

If a St. gives a penalty or part of a penalty to any person, who will 2 Chit. Pl. 187 prosecute, tho' for an offence immediately injurious to the public 1 Bac 37 only, there any individual may have an action qui tam for 2 Hawk 377 or 379 the penalty. The statute expressly gives any person the power of Common Dig bringing an action or at least plainly gives it. Smayling &c. Act on St. & S. (f)
4 Co 13.
Dyer 95.

If a St. inflicts a fine or penalty & then gives a sum certain to the individual who will prosecute for it, any person may bring an action in which can the penalty & the sum certain is recovered to that person who prosecutes auth. above the Returns the sum certain & pays over to the state &c the penalty. St. Here the action is qui tam

The principle is when ever a St. inflicts a penalty of any kind and gives to any individual who will prosecute for it any interest in prosecuting it gives him the whole or part of a penalty or the Reward any one may bring the action.

Qui tam pros^{2d}

When the entire Recovery is to the individual prosecuting I.C.

3 Bk 161.2. thinks that a qui tam is not the proper action. There is no Recovery
 here to the King & why sh^d the action be brot on behalf of the King?

When a st forbids an act immediately injurious to the public only

2 Hawk 377 no individual can prosecute on it in his own name unless the penalty

1 Bac 37 (u) or some part of it or some other Recovery is assigned by the st to him

2 Hawk. fol. 265 who shall prosecute. The prosecution must be commenced by the
 Atty^{Genl} & qu^o &c. because the person bringing the action has no interest

No power to sue is here given expressly or impliedly by the st. No one
 in such case can prosecute in his own name. In Eng² an individual
 may perhaps prosecute in the name of the King. (anti 49) smuggling.

2 Hawk 377 But if a statute forbids an offence immediately injurious as

1 Bac 37 well to an individual as to the public and gives the indi

4 Co 13. a vidual injured a penalty or part of a penalty or damages

12 Co 124 to be assigned by a jury - that individual may bring a

3 Bk 161 qui tam action on the st. for both the penalty & the damages

Bro f 134.

2 Bletty, Phazg. But if the whole penalty is to be to the party injured I.C. thinks that

187 (Note) &c the action sh^d not be a qui tam. He may have an action indeed

con & on the st. but in his own name & not all on behalf of the King.

act. st. f.

When a penal st expressly allots the penalty to the party injured by the

Cornyn Deg. offence he may bring an action in his own name not qui tam that
 Act on st (f) is not joining the King or state in the action.

3 Bk 160.1. When a st giving a penalty prescribes no form of action for the Recovery

Rept 175 of it the most usual & proper action is debt.^{*} for the penalty is made

4 Bac 653 a debt by operation of law. It may be also a special action

Bac st. 10. on the stat. which is called action on stat.

* 2u. Will Debt lie where the penalty is not due in money? I.C. thinks not.

It was once held in this state that an debitum assumpsit would lie to Recover 2 Lev 252
a penalty of a st. (New London by supr. b. t.) but it will not lie in Eng? Carth 92
So assumpsit was not granted for the Recovery of such claims, for assumpsit Espl Dig 7
is an equitable action. Besides it is not adapted to such a case, & there
is no form of assumpsit which reaches the case. The stat. is quasi a Record
& assumpsit lies not for a debt due by a Record.

Where a penalty is given by st. partly to the King & partly to him who 3 BB 162
shall prosecute the King by his proper Off. may sue for & Recover 2 Hawk 392
the whole penalty. 11 Co 65. 660
7 J R. 536.

We have a st. expressly enacting that the state may prosecute in such case.

A bona fide conviction on a qui tam prosecution either by action
or information is a bar to every other prosecution for the same bro 480.2
offence. This Rule holds e. converso. i.e. a public prosecution 11 Co 65. 66. a
bars a qui tam.

1 Bac 41

Act on St E. 2

3 BB 262

Cornyn Dig Act m 42.

So also a bona fide acquittal on a qui tam prosecution by action 2 Hawk 276 2.
or information is a bar to every other prosecution for the same (B)
offence & e. converso. 2 Hawk 392.

But Note the conviction or acquittal must be bona fide. The fact that
it was not bona fide is a good Replikation to the plea of a prior conviction
or acquittal.

The pendency of a qui tam action may be pleaded in 2 Hawk 391
abatement to any subsequent prosecution for the same offence. The Rule is laid down 3 Burr 1423.

that the pendency be may be pleaded in bar &c. but this is absurd for nothing
less than a judgment can be a bar. If once barred it is barred forever 1 Bac 41.
pro E 261
The Rule here must be the same as in civil cases where a prior pending
action is always pleadable in abatement only. Hot 209

Under a final judgment giving a penalty or sum to any one who will prosecute, no one individual can have an exclusive Right to prosecute.

2 Bl 437 until he commences the suit, but on the commencement of the suit

2 Hawk 390 he has an inchoate Right to Recover, which Right becomes consummated

2 Linn 141 on the judgment before the commencement of the suit then the Right to

Stratt 1169 prosecute is like property in a state of nature due to the first

3 Burr 1023 occupant.

2 H.B. 310:11

Roe 37 -

2 H.B. 34 Where the penalty of a Statute is given to a person injured by the offence he has an exclusive Right to prosecute.

2 Hawk 392 From the Rule first laid down it follows that the King may bar

Bro E 138 all actions by a Release to the offender or by a pardon before suit

583. commenced but after a regular action commenced the King

11 Co 65.b cannot Release the prosecutors part, for the prosecutor has

Authr 82 vested in himself an inchoate Right of Recovery by commencing

2 Bl 437 an action.

2 Hawk 392

Now in such case can the Atty Genl. enter a Mol

(Id) pros. except as to the part given to the state.

2 Hawk 392 Now can the King in any way discharge or suspend the suit so as to

2 Bl 437 bar the Right of the prosecutor. But Bl says that Parliament can do this if it can it is because it is omnipotent. No Legislation in this country

can do it - except by Repealing the Law.

Qu. Suppose the Statute is Repealed pending a writ can the Plt Recover? ante 28.

And where the penalty is given to the party injured by the offence the King cannot sue before action brought Release the part 2 Hawk 392 assigned to the party injured. because as to him the s^his Reme s^hoy 100 deals tho the Law is penal His Right accrues before action bro^t in me 2 #136 311. - deatly on Commission of the Offence. & this is true where the penalty is as to its amount Vindictive. The case is like a debt due by contract & the King cannot interfere.

The Prosecution in a popular action might at Comm: L Release his part of the penalty after conviction but not before. & Release before 2 Hawk 392 conviction w^d not have any effect in barring a subst action 2 Roll's R 33 - for the P^r had no Right at the time of the Release at least no consummated Right. But st 4 Hen 7 enacts that no concomitant Recovery in a popular action shall bar a Subst action & 2^d that no Release before or after conviction 2 Hawk 392/276 or pending the suit shall have any effect. I E. thinks this is in 3 Pl 162 affirmance of the C. L. for the C. L. in laying down its Rule supposed 3 Co 77 that there was to be no cover. & therefore that a concomitant Release 1 Bum 395 w^d be void at C. L. as well also as to a concomitant Recovery.

By st 18th Eliz the Prosecution shall not compound the prosecution 2 Hawk 397 until the Deft shall appear in Ct & shall have pleaded more than 1 Boxt 78 5 J R 95 without leave of the Court & it is discretionary with the Ct to 1 Bat 167 1 Bac 43 give leave or not & this st is under sever penalties. Common Dig Act on st E 2 1 Wils 79

But this composition when allowed by the Ct. extends only to the prose 4 Bum 1929 - extors part. & when the Ct. gives the leave to compound it is only on Common Dig condition that part of the penalty which belongs to the King shall Act on st E 2 be bro^t into bro^t. The part belonging to the King can never be compounded.

And after verdict found leave to compound is never given Common Dig except on the ground of the Deft's poverty. Act on st E 2 1 Wils 167

Municipal We have in Count. no similar st to these two.

Law.

- 2 Hawk 392 If a Off in a popular action Jus - Releas with Ours or
 11 Co 65:6. if suffers a nonsuit. the state may proceed with the prosecution
 5 Co 58 b or commence a new suit.
 3 BB 162.

2 Hawk 393 But when the penalty is given to the party injured by the Offense & he
 Nay 100 does to funding the suit the King cannot continue the suit. nor
 Moore 58. commence a new suit. Qu. Does the Right of action go to the
 Representatives of the Party injured.

If in such case part of the penalty is given to the party injured & part to
 the King & the party injured does funding &c. The King may sue for
 his part by the attor - Genl. by commencing a new suit.

When several ft. offenders are convicted on a ft. prosecution for the
 same offense in some cases the whole penalty is Recovered agt. each of
 the offenders & in others the whole is Recovered agt. all. i.e. the penalty is joint.

Anterior

Bul Nisi P. 189 II As punishments are in their nature several c law each offender
 Cro E. 486 is to suffer the whole penalty. except II where the penalty is given
 Salt 182 as a satisfaction to the party injured by the Offense. then as Recompense
 4 Bun 2046 is the object - in such case only one penalty is to be Recovered for one penalty.
 2 Cow 309 is a sufficient Recompense to the injured party. - This Rule holds unless the
 Bac Abr words of the st. clearly Require each to pay the whole penalty.
 St E.

2 East 573 And II. Where from the phraseology of the st it is apparent that the Legislature
 4 J.R. 809 intended only a single joint penalty for the whole. Ex: "He or they shall forfeit & pay
 Salt 682 &c" contra "if thus He or they shall Respectively pay" or "he or they shall each or
 Salt 182. severally pay &c". The intention of the Legislature when found must undoubtedly
 govern but the difficulty is in discovering the intention & for the purpose
 of discovering the intention these Rules are given.

Exclusion

When the phraseology does not decide it is to be born in mind that at C. L. each Offender suffers the whole penalty & this Rule must of course prevail unless good Reason can be shown to the contrary which is to be sought for in the intention of the Legislature.

3 But when the language of the St seems to Contemplate but a single penalty yet if the Offence was punishable at Com. L. so that the St is Coups 610 - cumulative the penalty under the St will be several - the St being merely cumulative it must have been the intention of the Legislature that the same persons sh^d be punished and punished severally as at C. L.

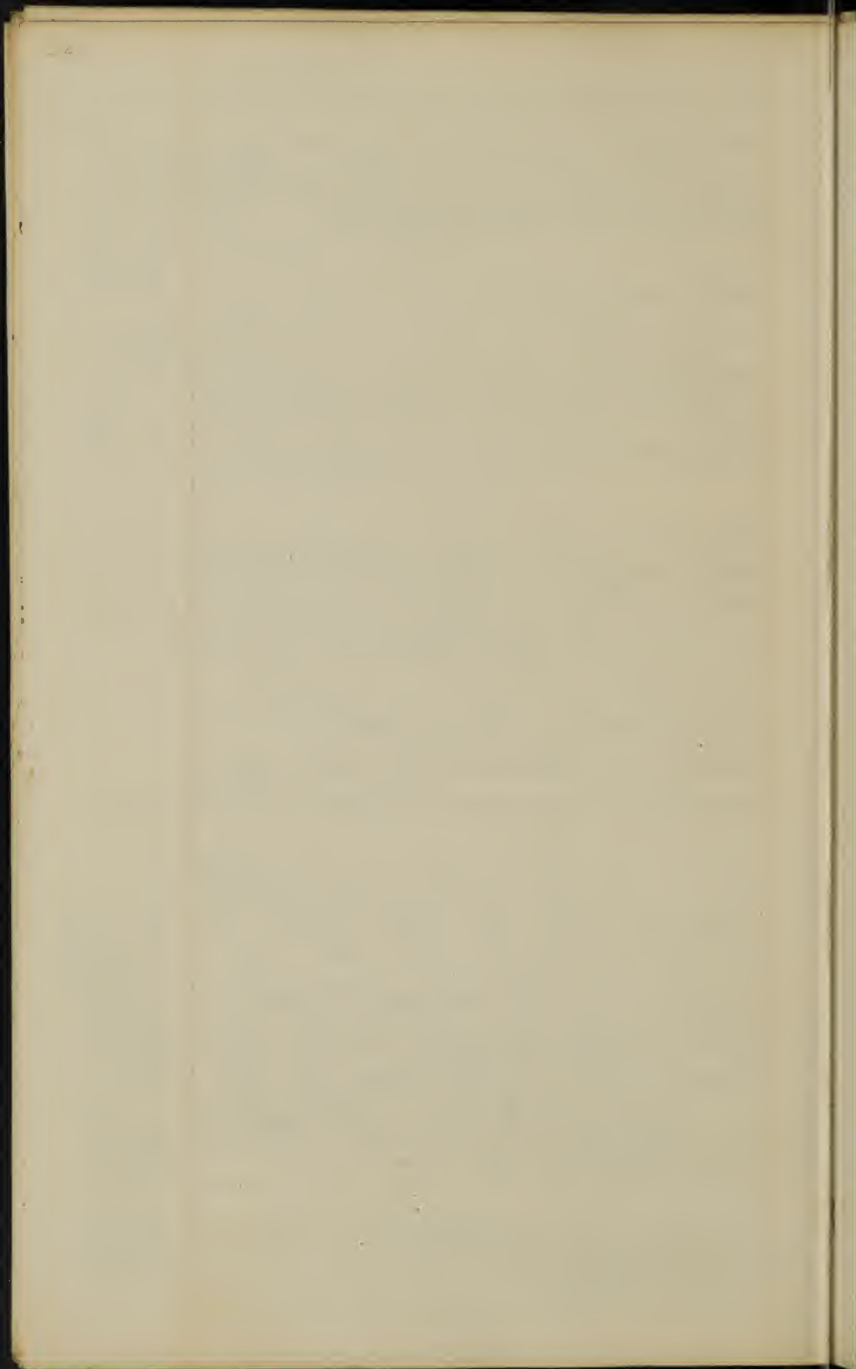
If Debt is brot however ag^t several Defts for the penalty of a St only one 1 St R 205 - penalty can be Recovered on acct of the form of the action & therefore Debt 3 East 569 sh^d not in such be brought, but a special action on the St sh^d be brot 4 Mass 137 - Return there are several Jt Offenders & the St Requires a several penalty and it has lately been decided that Debt in such case will not lie.

Ques. Will not Debt lie against one at a time?

Sometimes any number of continued acts will constitute but one Offence in Law in such case only one penalty is to be Recovered ag^t him who has committed Coups 640 these continued acts. Ex. St. ag^t performing secular business on Sunday. suppose a man labours thro^u the day & makes stops for meals & this days labour is but one Offence. This is a matter of necessity. on the other hand one act may constitute diff^t Offences.

In popular actions according to the English law. the Plf is not 2 Kel 781 entitled to costs unless it is expressly given by St. These actions are 1 Salk 206 not within the gen^l St^s giving costs. But when the penalty is 1 St Kel 10 given to the party injured by the Offence the Plf is entitled to costs 1 Bac 42 Act on St & 511: 19 Costs } as in an ordinary civil action.

In this state when the prosecutor Recovers he is always entitled to costs Hallock & is subjected to costs if he fails. on Costs



-5

Husband & Wife (No. 1)

Introduction

The subject matter of municipal law is divided into gen. heads Rights 1 BL 122
+ wrongs + the two objects of the law is to guard + enforce the former and to prevent 3 BL 1
+ punish the latter. First it is necessary to understand + ascertain Rights -
These Rights are of two kinds.

Rights of persons + Rights of Things + wrongs are private + public. Persons 1 BL 122
are natural or civil (artificial). The Rights of persons considered in this
natural capacities is as individuals are of two kinds absolute + relative 1 BL 123. 5
The absolute Rights are such as individuals are entitled to, enjoy 29: 134
independently of the Regulations of civil society. + these absolute Rights
comprehend the Right of personal security of personal liberty + of 2 BL 3: 8.
private property.

The Relative Rights of persons are those which grow out of 1 BL 123
the Relations of Society. 146.

And the civil Relations from which these Relative Rights Result are
either public or private. The Relative Rights of a public nature vide
1 BL 146. The private Relations from which Relative + duties Result
are four viz that of Hus: Wife. that of Parent + Child. Guardian +
Ward. Master + Servant. These are usually called the Domestic
Relations

Marriage is Regarded by C.L. and by our Laws as a civil contract Paley 188
in Roman Catholic countries it is otherwise. The immediate effect of mar. 1 BL 433
is the legal union or unity of the parties. for to many purposes Hus? & 1 BL 422.
Wife are Regarded as one person (not always however one)

Requisites of the contract vide post.

Legal effects of the Contract

I As Regards the Husband's Right to the wife's property. The Gen^l principle which Regulates this branch of the subject is founded on the Husband's duty to maintain & protect his wife & her property becomes so far his as to enable him to discharge those duties. Besides the policy of the Law Requires that the Hus: sh^d. have the control

2 Blk 455 The Hus: by marriage becomes in gen^l. the absolute owner of all the (Exclusion) wife's personal chattels in possession & may dispose of it. By personal paraphernalia chattels in possession is meant a chattel corp^s - distinguished from a sole & separate personal chattel in action - which is a Right to recover by action some property (post) thing not already in poss^s: - and nothing is necessary to be done by the Husband to consummate his Right.

Co Litt 351 - B of her personal chattels in possession, he may dispose at pleasure.
 1 Bac 289 he may bequeath them away from the wife or give them away
 B of Hen c. 3. He is the absolute owner.

If he dies intestate the Representatives of the Hus: have the personal chattels in possession which she owned before marriage - or which came to her during marriage
 Bac & B of Hen c. 3

Husband's Right to & over wife's property.

The Hus: has the control of property which she holds in another's Right: but he has no beneficial interest in it. he must therefore account for it.
 Co Litt 351

1 Bac 289 Indeed if a man marries an Est^{ee} he assumes the trust -

Bac & 2d Est. He has the legal title to the property precisely as if he was the Executor.

Salk 115 He is also entitled to such personal chattels in possession as accrue to the wife during Coverture - he is invested with all her interest in them.
 1 Bac 290 Thus if a distributive share in an intestate estate accrues to the wife during cov: the Hus: has all the Right in this share which she would have been entitled to had she been sole
 B of Hen c. 3

Salk 114 He is entitled to the avails of her labor precisely as if earned by his own labor.
 Esp. Dig 127
 1 Bac 290: 2

Husband's Right to & over Wife's property.

With regard to her personal chattels in action the Hus. may dispose 60 L. 351
of them at pleasure during their jt lives. He does not by marriage Stea 516
become absolute owner of them but he has the legal power to make them 3 Wils 55
his own during cov: he must convert them absolutely into his own Bar Abr 13 of 3
Reduce them into possession or do something equivalent to it during their ch on 13 110
jt lives unless by a settlement he has purchased them. This last
exception prevails only in Equity. If he does neither of these & the Hus?
dies first the wife surviving is entitled to them. 1 Bar 289 -

Husd's Right to & over Wife's choses in action.

If he does not then Reduce them into possession: & they would go to her
personal Representatives by C Law - if she dies the husband 1 Pl. 515
living, were it not for the st 29 Car 2. (Vide post)

1 Bac 289
2 Pl 435
1 Ch R. 21
Comyn Dig
B47 E.3.

the Rule of our law is undoubtedly as above - i.e. By the Proc in ch 209
law of Brunt they do on her death go to her Representatives (post) Sal t 173 -

By st 31 Ed 3. & 29 Car 2^d The Hus^d is entitled to administer on 1 Bac 289
the choses in action on her death & by 29 Car 2^d he may 1 Pl 435
administer shold them & shall not be obliged to distribute 1 Pl Wms 44
the choses in action with she leaves to his next of kin Salte 36
but himself. shall take as next of kin. 1 Ch R. 21

With regard to the origin of the Hus: Right to administer as above 1 Roll 910
the Auth^s differ much. 31 Ed. 3. Enacts that in case of intestacy in gen^l Salte 36
administration shall be given to her next & most lawful friend. 1 Pl Wms 44
intestacy 1 Pl Wms 44
next & most lawful friend. 1 Pl Wms 44
84. 4 Co. 51

According to some under this st the hus: is entitled to Administration - Comyn Dig
according to others he is entitled by C.L. jure mariti & that the st 31 Ed. 3.
contemplates no such case. The latter opinion appears impossible, for Admin: B.6.
Administrators were not known at C.L. at C.L. the property in such 2 Pl 515
case went to the Ecclesiastics. not liable to account. 3 Wils 246
4 Co. 51.

Husband We have no st similar to 29 Car 2 & then if a married woman dies before her hus: leaving choses in action they go to her Representatives & if the hus: takes administration he must distribute to her next of kin. This is the Opinion of the profession & clearly correct tho' there are no authorities.

Co Litt 351 But the hus: cannot during the life of the wife bequeath her choses in action unless he has purchased them by a settlement because a testat. bequest is not a disposition of them which takes effect during the marriage even in case of sale & assignment &c.

Co Litt 351 The hus: tho' under the 29 Car 2^d is not an Admin^r bound to distribute her choses in action yet he must pay her debts to the amt. of them. for a mar. woman can contract debts &c.

If another person on the wife's death takes out administration on Request of the hus: the Admin^r must pay to the hus: as next of kin the amt. of the choses in action after debts paid. The Rule is well settled, 1 Wills 168 but the hus: is not next of kin & is never so considered in the law 1 P. Wms 381 except in this case next of kin means always except in this Rule nearest by consanguinity. (contra in this state).

1 P. Wms 381 Thus Right of hus: as next of kin is traces upeth to his Representatives after pay^{mt} of debts. the Representatives of the wife are entitled 2 Hc 526 to administration but they are trustees to the Representatives of the hus: who are entitled to the Residuum. This Rule of course supposes 1 P. Wms 382b that the wife dies first & that then the hus: dies without taking out - (contra in Bourbⁿ) administration - This is merely following out the principle of the last Rule. This strange kind of law &c shows that women had no agency in making laws.

Proc in ch 63 A settlement made by the hus: or the wife is said to be an absolute purchase 312. 412 of all her choses in action. so that he has them at all events, when ever 2 Km 501 survives.

Husband's Right over wife's choses in action

(49)

This is a Rule of Equity alone. #

The later Opinions do not support the Rule to this extent the Amb 692
Rule now is that the settlement is not a purchase with an express or implied agreement to that effect. (Implied in such case Pres in bk 209
as this "the settlements in consideration of the wife's fortune") 2 Vern 64 3 P. Wms 199 (n)

But both these Rules contemplate a settlement made before marriage

But where a settlement is made after marriage it will not be deemed
a purchase - if there is an express or implied agreement to that effect 2 Atk 448
unless if a Court of Chancery deems the settlement adequate to her Rank Rot. Pl 285 (n)
fortune &c.

And a Ct of Equity can apportion the choses in action to the
adequacy of the Settlement.

A Ct of Equity will not bind the wife by her contract unless the
contract is perfectly Reasonable - having great dissimilarity with the Ct of Equity

Arrears of Rent due to the wife while sole stand at L.L. on the same 4 Co 51 a
footing as choses in action. but by 32 Hen 8th By marriage the Rent 351 a 7 bk. Pl. 21
due to the wife becomes absolutely the husband's. (1 Inst 79) 2 Pl 434. 5
2 Bac 7

In New York it seems arrears of Rent due to the wife dum sola Swift Lag 37
must be paid for by her & wife jointly. But for Rent accruing 15 John 479
from wife's land during coverture husb. may sue alone - 2 Taunt 181
(so of an annuity Revere D R 19. Owen 3.) 1 Ch Pl 23. 21.

If a debtor of the wife is sued by the husb. & wife jointly &
judgment is recovered agt him they are j. plaintiffs of the 3 Dom 189 (n 97)
judgment & the consequence is that if either of them die 1 Bac 293
before collection the survivor takes the whole. 1 Sid. 337. 1 Vern 396
1 bk Pl 21.

Under this Rule he & his Rep. will hold agt her conditions.

Barb Abx It has been said that he in this state. But here on the death of
B. H. (p) either the survivor takes one moiety & the Representatives of the
10 John 49 - deceased will take the other moiety. in Court there is no question
accruendi. 5 Day R 290 Hamrick v Brown.

The husband? if he survives both here & in Engl? has the sole Right of
collections so if the wife survives, but in Court each must account
to the Representatives of the other. for one moiety. This is the common
case of a Remedy surviving to the survivor where the survivor must
account to the Representatives.

Bro B 208

Salk 116 If either die after judgment ^{on charge in action otherwise} but before Ex^{or} Ex^{or} will not
2 L^d Ray? 1080 if free with^t same for - Vide title Ex^{ors}.
Barth 415
1 L^d 337
1 Br B 21.

37 R 94 The husband may assign the wife's choses in action during the con-
2 Atk 208 tinue if for valuable consideration (In Equity, for choses in action are
420. not assignable at law). The Reason of the Rule is that the assignee
3 P Wms 199 can claim only in Equity and as a Voluntary assignment is inequitable
1 Br B 44
Robt H 295
1 Foub 388
5 Lm Chy 196 quoad the wife that it will not support it.

1 P Wms 380 It has been held that a Voluntary assignment is such an act as is
Robt H 295 a Reduction of the chose in action into his possession. but this is
2 Atk 208 not law. There is a kind of Absurdity in saying that an act which
1 Br B 44
Robt 295 is void as being inequitable quoad the wife sh^d yet defeat the wife
not Rule
Suppose the assignment is for a note & the assignee can & does collect
it without resorting to a Court of Equity.

But the husband may Release the wife's choses in action without
consideration - for he has the legal power of disposing
2 Atk 208 of them as he chooses & a Release operates at Law & a L^t.
1 Foub 388 of Equity cannot destroy it -

Husbands Right over Wifes choses in action

(57)

If the husb^d himself is obliged to Resort to Equity to obtain possession 1 P. Wms 382. 458.
of her choses in action that Ct. will not in genl. decree in his favor unless the husb^d will make a Reasonable settlement on the wife Robt 36. 280

Ex: Where bonds &c are in the possession of Trustees. Thus Rule 288
trusts, supposes that the husb^d has not purchased the wifes choses in action 3 Vaux for 15. 506
by the Husb^d?

If the assignee for value of the choses in action is obliged to Resort 1 P. Wms 382
to Equity - the Ct. will not interfere unless he makes a Reasonable 257: 458
provision. Ex: the choses are in the hands of trustees & the assignee Robt 291. 4
for value applies to the Ct. to have them assigned by the trustees Powl. M. 325. 6
to him that Ct. will not decree in his favor unless &c. 3 Vaux for 15. 506 -

If the Husb^d dies before the wife the choses in action if not purchased Co Litt 380
are not liable for his debts - neither during his life can they be taken 1 Bac 289
in Ex^{or} for his debts - for they are not his & choses in action cannot B of ac -
be taken in Ex^{or} the first Reason wd hardly be sufficient without
the help of the second - vide bottom of page 75 for this title.

Husbands Right over Wifes property bailed

The personal chattels of a feme sole who are in possession of another
by bailment or finding they on marriage become absolutely his &
he may sue for them in his sole name. (some confusion in the
books on this subject) (The Rule supposes merely a bailment by
deposit where she has a right to countermand & redun) - Goods
belonging to her in the possession of another by bailment or finding
merely where there has been no unlawful taking or conversion are in her
constructive possession - And therefore they are his and if they are
afterwards converted he must as I. G. thinks sue alone. but in
the books there are 3 opinions on the subject - (Vide post)

- 1 Sid 172 The three opinions mentioned here are these -
 1 Lev 107 I. The Husband may sue alone - II. He may join the wife - III. He must
 1 Vern 261 join the wife - But he must sue alone (says I G) - Was
 37 R 631 there a Right of action in the wife at the time of the marriage?
 certainly not. then her Right was not a chose in action - then she
 must have been in her constructive possession if so then they become
 absolutely his & he must sue alone.
- 37 R 631 But if goods belonging to a feme sole have been converted during her feme
sole ship she must join with the husband in suing for them for in this
 case her Right at the time of Marriage is clearly a chose in action.

Husbands Right over Wifes Chattels Real -

- 37 R 331 If you is bound by contract to the Husband to pay money &c to the wife
 this bond &c is subject to the control of the husband: pay^{mt} to her indeed
 will discharge the Contract but the Contract gives her no other
 Right but merely to Receive the money - The bond is an if
 3 East 335 to the husband: the Husband is the obligee & in this case the Contract
 being by bond the Husband must sue alone (See under party's
 vide Contracts -

2 Bl 386 Chattels Real

- Go Litt 46.351 Over those when vested in wife the husband has a more extensive
 47 R 638-9 - Right than over her choses in action they are liable during the
 1 Roll 344 marriage to the Husband's debts - may be taken in Ex^{ce} This supposes
 that the wife's title is a legal title - tho in Equity in some cases
 an equitable interest may be taken in Ex^{ce}. vide Do^{ce}
 They are not absolutely in the husband by marriage -
 How then can they be taken in Ex^{ce} for the Husband's debts?
 the husband has power in Law to assign them
 for the paymt. of debts as then he has this power the Law
 will dispose of them in favor of his C^{red}.

Husbands Power over Wifes Chattels Real

53

During the jt. lives he has an absolute power to dispose^{tho} if they are not disposed of during Co & one dies the whole goes to the survivor. They are quasi jt tenants of her chattels Real

C Litt 351
Stra 516,
Proc in Ch 218
2 Bl 434
Co Litt 46 b

In this state on the death of the wife the husb^d surviving it has been decided that they go to her Representatives. This was by the old Ct of Errors & perhaps w^d not now be law. This is not the Rule of the C.L. & when at C.L. there w^d be a jt tenancy our Ct make a tenancy in Common. but according to this Rule they are not jt tenants in Com: 2 Day 338.

By C.L. neither the Hus: nor wife can devise her chattels Real. For the Right of the survivor is as in other Cases of jt tenancy superior to the Right of the devisee. Proc in Ch 418
2 Vern 270
2 Bl 434
Co Litt 361 (a)

In this state it would seem from the case above that the wife might devise them 1 Bac 286
4 Pl 538

The Husb^d may by act executed dispose of them during the marriage to Vert in perf: after his death - by lease or assignment - for this is not a testamentary disposition it passes a Right of future enjoyment - this Right passes instant.

They are not liable for the husb^d debts after his death if the wife survives him - like every other case of jt tenants. Her Right by survivorship is paramount to the Right of Creditors it is prior - As by devise the husb^d could not charge them with the paym^t of debts - the wife could not do the same thing. 1 Roll 349
Litt 5286
Co Litt 184 b
3 Bac 209. 10

Nor by C.L. are they liable for the wife's debts if she dies first - for the same Reason. His Right is paramount by survivorship to "tenancy" 3b

But here they w^d be liable to her debts - if the case of Evarts & Chittenden is law. 2 Day 338.

Co Litt 185 And if a firm sole bring jt tenant of a chattel Real with a
 Plow 408 hus & person & then marries & then dies the stranger surviving
 1 Bar 287 has the whole of the chattel - But in this case the hus: has
 B & F. c. 2. during the coverture the same person to sever the tenancies she wd
 have had had she remained sole.

1 Vern 7. 18 The hus: may during coverture assign the wife's chattels Real even
 2 Vern 270 in Equity with^{out} consideration. This does not mean that that it will
 3 P. Wms 39 enforce such an assignment as ag^t the wife. It means merely that
 Rob 26. 299. 301 the Ct. of Chanc^y cannot set it aside - the assignment being good at
 Law a Ct. of Eq^y cannot interfere.

Husbands Right over the Wifes Real estates of inheritance

1 Sid 11 Of them during the marriage the husb^d has the sole control & use tho' at
 10 Co 42 l. L. he cannot alien them down - tho he may alien during cov:
 1 Bar 286
 B & F. c. 19.
 1 Roll 387

1 Bl 444 Nor can the hus: & wife by their jt act alien her inheritance except by fine
 Litt 569. 70 & com: Recovery for as the wife is supposed to be under the control of the hus:
 Bar Abt her signing &c is merely void & therefore their jt deed is the deed of the hus:
 Bar of (8) alone which cannot alien her inheritance.

In this state gen^{ly} however the estate of the wife may be aliened by the deed
 of the hus: & wife jointly. not by any direct stat but by a st which counts
 upon the practice &c.

Litt 5. 415. 594 If the hus: during coverture grants a larger estate than for his own life this is no
 9 Co 100 forfeiture tho' all other tenants for life by so doing forfeit their estates.
 2 Bl 274 For the coverture of the wife disables her from claiming the forfeiture ag^t the husb^d.
 Co Litt 326 Besides if she sh^d recover the husband's Right wd instantly commence as of
 Bar Abt B & F (c) an estate acquired by the wife during Coverture. 2^o. Can wife's heir
 claim the forfeiture? No (194)

In such case the grant will enure as a grant for his life or during
coverture according as he is or is not entitled to Courtesy.

Co Litt 326
1 Bro 301
Bxf. (i)

And if the hus. makes a lease it will be valid as long as the husb. lives if he
is tenant by courtesy if not until wife dies

Bro 9 22

& by st 32 Hen 8th Husb. & wife may make a ft lease for 3 lives of her
inheritance

378
2 Saund. 180 a 9

If the hus. dies first her Real estate vests also lately in the wife on the
other hand if the wife dies first the inheritance descends immediately to
her heirs. tho the hus. if the wife has by him a child born alive during
the life of the wife capable of inheriting is entitled to a life
estate in the wife's inheritance - of which she dies seized.

Litt 335. 52
Co Litt 30
2 Pl 126.

And the Husb. is entitled in such case to Courtesy in the wife's
equitable estates as in Equities of Redemption

Powl M 112 -
115 -
1 Atk 63. 603 -
1 Pl 127. 30

In ganthkind the Husb. has courtesy without force and the tenure
of Court. lands as granted by the charter is ganthkind but in
adpt in Court the C.L. Rule with respect to Courtesy -

By the birth of a child capable of inheriting to the husb. is tenant
by courtesy immediate & it is consummated by wife's death.

Co Litt 30
2 Pl 28

Rent accruing out of the wife's Real property during Cov. goes
to the survivor at C.L. But by 32 Hen. 8th if the Rent
has accrued before coverture the husb. is entitled to it -

Co Litt 357 a
162 b
4 Co 57
Amb 692
1 Roll 350.

(ante 71)

Husband's Right over wife's Real Estate

Husband & Wife A feme covert cannot at C.L. hold property to her sole & separate use and tho' she now may, yet it is by virtue of the Law of Chancery.

1 Foul 94:8

1 Atk 270

1 Pow. C. 103

Property held to the sole & separate use of the wife is such as she holds exempted from all marital Rights whatever & Chancery protects this property at all events, & under all circumstances & to every extent.

2 Ves 191 At this time a gift to her sole & use is protected in Chancery
665: 3 agt. the claims of the Husb. he cannot have courtesy
2 P. Wms 79 in it. Nor indeed any Rights whatever.

316

1 P. Wms 126

1 Foul 94:5.8.87

1 Atk 270

1 Pow. C. 444

1 Foul. 87. 98. 100. 2. 3.

25 R 695 Over such property the wife in Equity may exercise
1 Pow. C. 444 as absolute a power as if she were sole with the single
(Lb) exception that she cannot devise it directly if it is
3 Atk 393 Real property & this by the st 34 Hen: 8th
695.

3 P. Wms 337

Pow. C. D 150 But the Wife may make a testamentary disposition
165: 6 of it by way of declaring a trust &c & thus virtually
Comyn Dig devise it - vide post & Devins.

Bo. D. p. 1.

Husband & Wife (No. 2)

The Husb^d cannot by his disent defeat a gift to the sole & separate use of his wife. Co Litt 30.
the wife is ^{12th} but he may defeat any other gift or purchase when made s^{te}.
to the wife - For the wife's power of assent is by marriage taken from the 1 Bac 303
wife & vested in him. c. Law. B & F 5-

But he cannot defeat a disent of property to the wife for the law casts Co Litt 3
the disent & no assent is necessary in such case - The wife if a feme s^{te} (b)
sole c? not by disent defeat the disent 2 Pl 292:3
Comyn Dig B & F 2

The wife's power of assent is also suspended during cov: & she may after 1 Roll 309
death of Husb^d disent from or ratify any purchase made during Co Litt 3 (a)
coverture & the assent (or disent) of the Husb^d does not bind her after his death Long 435
Comyn Dig B & F (R)
Esp & Dig 291

But suppose the Husband disent & she survives with his disent bind her.
ie can she by assenting make it her own. I G thinks not. For after a
valid disent the offer does not bind the person who made it & the disent
of the Husb^d is in law valid.

Husband's Right over Wife's property.

Her Representatives may also after her death disent provided she
does not during her life assent. Co Litt 3 (a)

But where the Husb^d neither assents or disents to her purchases made Comyn Dig B & F (p 2)
during Coverture they are good during cov: after cov: she may disent or Co Litt 3 a
ratify them as she pleases. Her disent & assent during Coverture are both valid

It has been held that if a feme sole being possessed of a trust term for years 1 Fout 98
to her sole & separate use marries during the term, the term vests in the Husb^d 1 Wm 7. 18
by the marriage per maritum. 2 Hk 421

2 Bro Lk 365. But this is now reversed and the old Rule appears unreasonable
 Co Litt 3a. If she had the legal title of a tenement to her sole & separate use past
 112. all question the Husb^d wd have no Rights in it.

For voluntary conveyances by wife before coverture &c. vide fraudulent conveyances.

Rights of the Wife over the Husbands Property.

2 Bl 515 1st. In every state here in Engl^d there is a set of distributions 22 ch. 2.
 Toller Esq^r under which if he dies intestate leaving issue she is intitled to one third
 2 Bac 127. 8. of the personal property of the Husb^d and if he dies leaving no issue she
 is intitled to one half of the personal property of her Husb^d.
 This Distribution is made after debts paid.

Litt 536 By b. L. the wife is intitled to a life estate in $\frac{1}{3}$ of all the inheritable property
 2 Bl 129. 131. & Alth^o he has been possessed or seized at any time during coverture and
 with any issue with she might have had could by any possibility have
 inherited whether she has actually had issue or not — vide title Dower
 called Estate in Dower.

10. 60 49 And the Husb^d cannot at b. L. by any alienation bar the wife of this Right,
 2 Bac 139. 140 she may bar herself by joining with the Husb^d in fine & Recovery, but
 Plowd 575. not by joining in a deed with him of it. for the seigning &c of
 the wife is merely void.

Dower

In the sts of N. Y. and Mass. by st she may bar herself by joining the
 Husb^d in a deed & in those states the wife is interviewed as to its being her sole
 act & free act &c &c

In this state the Rule is that the wife is intitled to a life estate in one third of
 the Real estate which he owns at his death & therefore the Husb^d may
 by his own deed bar her Right of Dower.

Wifes Right to Husbands property Dower

When she does not bar herself then the Rule is that if any issue which she might have had c. have inherited any Real property of that Real property she is entitled to dower but not otherwise.

If then an estate is limited to a & to the heirs of his body by his wife B. Litt 553.
his wife C cannot have Dower of this property. 2 Blb 131

To entitle her to Dower however she must have been the wife of the dec.^d husband at the time of his death. If divorced then a vinculo matrimonii she cannot have Dower. for such a divorce renders the marriage void ab initio & the children are illegitimate. 7 Co 70
560 98
9 Co 19
Key 108
Bo Bar 463
Co Litt 32:3-
A Divorce a mensa et thoro does not bar her of Dower for such a divorce does not destroy the Relation of Husband & Wife. The children are not illegitimate & therefore may inherit Bar A Dower c.
in Count. may have Dower the divorced, if she were the innocent party (stat. lit. Dower)

If the husb.^d was at the time of marriage & death under the age of legal consent the wife is still entitled to Dower because the marriage was but voidable & has not been avoided for he c.^d not avoid before he became 14 & after his death it cannot be avoided for it is an universal Rule that a marriage cannot be avoided after the Death of either party. 40 a
Bo Litt 33 a
He must however be over the age of 9 when he dies or she is not entitled to Dower. but she cannot be too old to be entitled to Dower. 2 Blb 131
Litt 536
Co Litt 33. 40 a
1 Roll 675.

It was anciently held that the wife of an idiot might be endowed but the Rule is now altered. & it was always held that the husb. was not entitled to Dower. where the wife was an idiot. 2 Blb 130

To entitle the wife to Dower the marriage must have been legal. in Count living with him at the time of his death if settled in gnt. co Dower. It is Dower. 1 Lev 41
Buller 136
Esp. Dig 125

Wife's Right to Husband's property Dower

2 Bl 492
Co Litt 36. 35
4 Co 64.
66.
10 Co 49-

The Widow's Right of Dower is paramount to the Right of the Husband's devisees - his Creditors & even mortgages whose mortgages were made during marriage.
The Widow's Right is in Court paramount to the Creditors & Devisees.

(2b)

But her Right to the personal property of the Husband is postponed to the Right of the Legacies & Assignees.

In this state her right of Dower is paramount to that of the Creditors & Assignees but not to that of mortgages - she may indeed Redeem - The Law of Dower in this state are regulated by Statute - The words of our Statute.

But the construction which is given to our Statute makes it unnecessary that the husband should be seized if he owns it is sufficient - "And possessed in his own Right"

The husband cannot in Court by devising away his Real Estate lose the Right of Dower nor can he do it by any mode of Alienation which is to take effect after his death.
(Court) If husband makes a deed to take effect after his death this will not defeat Wife's Right. The husband was owner at his death.

In Court if a man dies without issue leaving a widow unable to support herself & who has no Relatives obliged by law to support her - the heirs of her husband & Assignees are bound to support her during widowhood if her dower is not sufficient.

2 Hk 526
1 Do 606
3 P Wms 229
Toll 138
1 Bl R 138. 161
1 Br 6h 326
Butt Mort. 321
2 P Wms 700

The wife is not entitled to Dower in her husband's Equity of Redemption. This Rule supposes of course a case in which the mortgage is made by the husband before marriage.

1 Court 559 In this statute the wife is entitled to Dower in her husband's Equity of Redemption of an estate in fee simple. so also in New York.
6 Co 290
7 Idem 278.

How Dower may be barred?

Her Right of Dower is barred by a divorcement à vinculo matrimonii - again by adultery, thus if a man marries an alien - in such case - It is usual 2 Pl 130. 6. 7. to obtain a private stat. enabling her to hold dower.

If indeed a foreign woman becomes naturalized, she has Dower as a natural born citizen.

Again her Right of Dower is barred by Adulterous elopement. This is a st. Rule, the Co Litt 32 1 Roll 680 principle is that a woman ought not to be allowed to claim any Right on 3 P. Wms 276 2 Pl 136. account of a Violation the Laws of which she has violated.

If Husband in his life time has been attainted of treason the wife loses her Right of Dower - for the heir at Law loses his Right & the widow can never have dower where the heirs lose their Right to the property. For she holds by a species of subinfeudation from the heir.

H. C. L. by felony of the husband the wife is barred of Dower but by 2 Pl 130. 6. 1st Co W. 6th this is altered

These last two Rules cannot apply here for such a Rule wd be contrary to the Constitution of the U.S.

Con U.S.
Art 3. 53 p 2
Cons. Court.
Art 1. 3. 15
Cons. U.S.
Art 1. 59 p 3.

H. C. L. the widow forfeits her Dower by Retaining the little Duds at least during the detention. if she pleads falsely the bar is perpetual.

Ex. gr. she brings an action for her dower & the heir pleads detention of the little Duds & she denies & the issue is found agt her the bar is perpetual

If in an action brought to recover the little Duds by the heir she pleads that she does not have them in her possession & the plea is falsified by verdict 5 Co 75 2 Pl 136 9 Co 87. 8 she utterly loses her Dower

2 Pl 136, 7 (C) again if she alien is in fee or for the life of any other person than
 3 Bac 230 herself such an attempt is ipso facto a forfeiture - This by 6
 Litt 5. 415 1 Edw 1st tho it is a C. L. Rule.
 60 Litt 200

2 Pl 274: 5.

2 Pl 137: 8 She may also be barred of her dower by accepting a jointure from the
 1 Bats 173 husband.

2 Bac 105

140.

Dower how barred.

she may bar her dower by joining in a fine or Con: Recovery
 10 Co 49 of her husband's estate - the principle is not that a fine court-
 2 Bac 139 can convey away her own inheritance or bar her Right of dower
 140. by conveyance - but on the single principle of Estoppel the Record
 precludes her from averring that she was a fine court at the time.

We have a st that a total divorce shall bar her of dower only
 when she is the faulty cause of the divorce. - One st seems to imply
 that a fine Court living absent from the husband at the time of
 his death without his consent & without such cause is not entitled to
dower

The Criterion then in genl is this if the wife procures by her
 application a divorce she is entitled to Dower, unless she
 retains a portion of her husband's property on the divorce -
 st let Dower.

In charity the wife has a Right to certain other articles entitled "her paraphernalia" - which consist of Apparel & bedding & ornaments her Right to these appears to be cognisable only in Equity.

The distinction between her paraphernalia & personal property to her sole & separate use is important.

As to her paraphernalia he may dispose of them as he pleases during his life but over property given to her sole & separate use he has no control -

Property to her exclusively in a form Gov. so as to exclude all the husband's Rights 3 Hk 393. must be given to her sole & separate use but no particular form of words is absolutely necessary. Whether it was intended to give Property to her sole & separate use is in question to be determined by the words used but this 1704 b 98 intention may be inferred from the nature of the property & from circumstances. Thus where articles of this kind. watches, plate, jewels, trinkets, &c intended as female ornaments have been given by the father of the 3 Hk 393 husband to the wife on the marriage - it was determined that no words 1704 b 98 manifested the intention that these were intended for her sole & separate use. So if they were given by a stranger - by the husband on the marriage.

Wife's claim to Husband's property; Paraphernalia

But whether property shall be Paraphernalia - a property to her sole & separate use must depend on the intention of the Donor.

But where articles of this kind are bequeathed to her by the husband they cannot be regarded as property to her sole & separate use - she takes as legatee merely - Of course these may be subject to his debts. It is not even her paraphernalia in this case.

Where articles of this kind are given by the husband during their lives 3 Hk 393 there are not regarded as to her sole & use. The Rule (ante) contemplates gifts &c made at the time of marriage in which case the Rule is diff.^d

1 Roll 911 Paraph^{er}ia are of two kinds - I. Apparel & bedding - II Plate & female ornaments
 2 Bl 235-6
 Bouyer Dig-
 B & F (f3)

1 Roll 911
 Bro Car 250 The Husb^d during his life may dispose of the 2^d Class as he pleases
 or 343
 2 Att 77 However he might begin them but as the law now stands
 3 Att 358. 395 he cannot.
 2 Bl 436
 1 P Wms 780-

But the 2^d class may be taken in Execⁿ by the Ex^{ors} of the Husband.

Dea 501 But the 1st class cannot be taken by his Ex^{ors} nor can the husb^d dispose of them
 2 Bl 236
 Bouyer Dig This Rule contemplates merely misfary apparel & bedding. Indeed the
 B & F (f3) selling of all her apparel has been held a misdemeanor - misfary means
 1 Roll 911- suitable to her Ranks.

With regard to 1st class in Court there is no need to resort to Equity. for
 we have a st^{at} provision which protects them from Execⁿ both before & after husb^d's death.

Paraphernalia 2^d Class

The 2^d Class are assets for the pay^{mt} of debts in the hands of Exec^{rs} &c when there is
 a deficiency of other personal property. not before. & as to this class the
 2 Att 106 claims of the wife are paramount to all Rights except those of Ex^{ors}.
 3 Att 369
 395
 1 P Wms 730.

1 P Wms 730 But there are cases in which when the wife's paraph^{er}ia is lawfully taken for
 Tollor 422 the pay^{mt} of debts she is entitled to compensation out of the Real Estate
 2 Att 104 of the Exec^{rs} in the hands of the Heir.

If Specialty Ex^{ors} takes the 2 class in Execⁿ she is considered in Eq^{ty} as
 77 a bond^{ed} agt the heir pro tanto. For the Ex^{ors} have here taken her property
 3 Att 369 when they might have taken the land & her Right to the 2 class is preferred before
 395- the Right of the heir.

2 Att 205. 100. 5. But if the 2^d class are taken in Execⁿ for the pay^{mt} of simple contract debts
 she cannot then have indemnity from the heir. But in Court this
 distinction does not prevail

2^d class of paraphernalia

A settlement or jointure on the Wife before marriage if it is void to be in consideration of the exclusion of all her demands on the Husband prop^y 2 Vern 49. 83 she has no claim on the 2^d Clap. same if made after marriage in Atk (2) 642 consideration of agreement made before marriage.

But a sett. or jointure made after marriage is not in pursuance of articles made before marr. tho' it contains the clause in bar of all demands or "in bar of paraphernalia".

will not oust her from her claim to the 2^d Clap.

It has been held that she has the same claim agt. the devisor of her husb^d 3 Atk 395 1 P Wms 730 lands as agt. the heir when her paraph^l have been taken to pay the husb^d Toller 281 debts by specialty bond^s. This Rule has lately been questioned. tho' 422. 3- 2 P Wms 554 (m) I.G. cannot see why a Quien sh^d not stand precisely on the same footing Ant 6 as a legatee. 2 Key 7 3 Atk 438.

If the Husb^d pledges these paraph^l during his life to a br^o on his death 3 Atk 395 she & not the Ex^{or} has the Right to Redem & if after pay^{mt} of the debts there is a surplus of personal prop^y she is entitled to enable her to Redem the paraph^l. But if the Estate is insolvent the Ex^{or} may Redem.

The widow's Right to claim property or paraph^l agt. the disposition of the Husband is strictly personal. If then she does not claim 2 Vern 246. 7 then her Representatives after her death cannot claim them. Bro Car 343. 6 And if the Husb^d had bequeath^d them to her for life Remainder 1 Roll 911 to a third person if she does not assert her absolute claim to them but acquiescing her heirs &c cannot claim them after her death.

her Count in addition to her distributive share of the personalty she is in certain circumstances allowed a certain share of furniture &c this st in C^t of probate has been very much extended.

Husband & Wife (No 3)

The Husband's Liability for the wife.

He & she are jointly liable for her debts. 2^d for her torts 3^d Some
times for her crimes

1 Eq. ca 60 II The husb^d & wife are jointly liable during coverture for the debts due
1 Bl 443 from her while sole. but his liability ceases on her death unless judgment.
Eph^a Dig 122 has been recovered ag^t them before her death
7 JR 348
3 Mod 186.

But if judgment was obtained ag^t husb^d & wife for any of her debts while
she was alive the judgment converts the debts due from the wife into a joint debt.

Co Litt 357 When she dies before the husband & before judgment obtained the
3^d P. Wms 609 Cr. must loose his debt unless she leaves assets. & this Rule holds
1 Bl 443 (cu) pending the suit - & even after verdict.
1 P Wms 668
Eph^a Dig 122.

3 P Wms 609 If he dies first & she survives she becomes sole Debtor unless judgment has
7 JR 349-50
Eph^a Dig 122. been obtained ag^t husb^d & wife & the Ex^r of the husb^d is not liable.

The principle of the husb^d's liability is this As she by marriage loses much
of her property she has no means left by which to secure herself from
arrest & imprisonment.

15 R 486 Hence she cannot in any civil action or process be held in custody
2 Bl R 720 or arrested alone & if arrested alone she must be discharged on common bail.
Salt 115
1 Wilson 149
3 Wilson 124
Comyn Dig B & P (b)

600 f. 323 But this Rule does not hold where she has been sued while sole & maioris pendi
3 Bl 413 the suit. in such case as she was held to bail rightfully. she cannot by her own act
Eph^a Dig 328 discharge herself. in such case the Cr. may proceed ag^t her as sole &
1 Wilson 314 she is liable to Ex^r alone & may be taken & committed on Ex^r alone.